UNITED
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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 849

Case No. 935: VON SETH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Carl Fredrik von Seth, a former staff member of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 May, 31 August and 30 November 1995 and to 28 February, 31 May and 31 August 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 9 August 1996, the Applicant filed an application containing pleas which read, in part, as follows:

"8. ... requests the Tribunal to find:

(a) that the harsh and unreasonable administrative decision to dismiss the Applicant was unjustified and led to irreparable damage to the personal and professional image and reputation of the Applicant;

(b) that the rationale justifying the Respondent's decision to separate the Applicant was motivated by extraneous factors including false rumours;

(c) that the Applicant was denied proper redress through a procedure established by the Secretary-General and

that the irregularities of the JDC [Joint Disciplinary Committee] proceeding occasioned a lack of due process;

(d) that the Applicant was subjected to a disciplinary proceeding and subsequent alleged errors which pertained to the Applicant's performance and not his conduct;

(e) that performance falls within the competence of supervisory officials and is not subject to disciplinary measures and consequently, the entire matter was a procedural error as it should have been assessed under Chapter XI not X of the Staff Regulations and Rules;

(f) that notwithstanding the impropriety of a JDC in this instance, the findings exonerated the Applicant.

9. The Respondent denied the Applicant his due process rights in the manner which follows:

(a) by not respecting paragraph 6 of ST/AI/371 and denying [the] Applicant the right to comment on the allegation before the review;

(b) by not respecting paragraph 20 of ST/AI/371;

(c) by allowing the Respondent to use evidence in the hearing, [which evidence was] denied to the Applicant until after the proceedings;

(d) by the acceptance of [an] unsubstantiated rumour to be cited as fact and [by] shifting the burden of proof to the Applicant to prove unknown rumours were false ...

10. ...

(a) to order that the decision to dismiss the Applicant for misconduct, conveyed to the Applicant on 8 November 1994 by letter of 1 November 1994 ..., be rescinded and to order the Applicant ... reinstated as of 8 November 1994;

(b) alternatively, to order that the Applicant be awarded the payment of two years' net base salary in lieu of notice;

(c) and to order an amount the Tribunal deems appropriate as an additional monetary sum in compensation for the moral suffering and professional prejudice inflicted on the Applicant."

Whereas the Respondent filed his answer on 10 June 1997;

Whereas, on 27 October 1997, the Applicant filed written observations;

Whereas the facts in the case are as follows:

The Applicant, a national of Sweden, entered the service of UNHCR on 14 April 1985, on a one-year fixed-term appointment, on secondment from his Government, as a Protection Officer in Maputo, Mozambique, at the P-3, step VI level. After successive renewals of this appointment and reassignment to Lubumbashi and Dilolo, Zaire, and to Karachi, Pakistan, the Applicant received a three-year fixed-term appointment on 1 January 1990, which was renewed for another three years, on 1 January 1993.

With effect from 12 March 1991, the Applicant was assigned to the UNHCR Branch Office in Amman, Jordan, as a Senior Protection Officer, with a special post allowance to the P-4 level. On 3 December 1992, the Applicant was put on special leave with full pay until 23 March 1993. Between 24 March and 24 June 1993, the Applicant was sent on mission to Sudan. Upon his return, he was again put on special leave with full pay, until his separation from service on 8 November 1994.

According to the files, the Applicant met a Jordanian citizen, Mr. X, in August 1991, when the latter came to the Amman Office to submit a job application. Although there were no vacancies at that time, Mr. X began to frequent the Amman Office, offering his services to the Office staff. According to the UNHCR Representative in Amman (the UNHCR Representative), he had warned the Amman Office staff, including the Applicant, in April and May 1992, to avoid Mr. X since information had come to light that

Mr. X's prior employment with the European Economic Community delegation had been ended due to improper use of his position. Despite this warning, Mr. X continued to visit the Amman Office.

On 4 November 1992, the UNHCR Representative sent two notes for the file dated 28 September 1992 and 4 November 1992, to the Chief of the Regional Bureau for South-West Asia, North Africa and the Middle East (SWANAME), UNHCR, Geneva. These communications concerned an allegation that Iraqi asylum seekers might have obtained refugee status and subsequent resettlement through payment of large sums of money to Mr. X.

The UNHCR Representative's note to the file dated 28 September 1992 concerned suspicions that the Applicant might have improperly granted refugee status to two Iraqi asylum seekers, whose previous requests to obtain that status had been rejected in letters signed by the Applicant. Suspicion of the Applicant arose from alleged procedural irregularities and from the fact that one of the asylum seekers was a brother-in-law of Mr. X. The Applicant denied that he had known about this family relationship.

The UNHCR Representative's note to the file dated 4 November 1992 concerned another incident in which an Iraqi asylum seeker, Mr. Y, had paid US$5,000 to Mr. X who, in return, promised to have him resettled in a third country through UNHCR, using his special relationship with "Carlo", which was apparently another name for the Applicant.

On 6 November 1992, the Regional Resettlement Officer, UNHCR, Nairobi, claimed to have lost US$5,000 in June 1991 and suspected that the Applicant had taken the money. The Regional Resettlement Officer alleged that in June 1991, he had requested the Applicant to hold US$5,000 in the Amman Office for safe keeping and, in the presence of another officer, Mr. W, had transferred the money to the Applicant. However, Mr. W was not able to confirm the Regional Resettlement Officer's version of events. In August 1991, when the Regional Resettlement Officer inquired about the money, the

Applicant denied having ever received any money from him. After allegedly numerous attempts by the Regional Resettlement Officer to reclaim the money, the Applicant gave him a US$1,000 cheque "because he felt sorry for him".

An administrative investigation of this matter was conducted by the Acting Director, SWANAME, in Amman between 11 and 14 November 1992. The investigation revealed, inter alia, that Mr. X was well known in the Iraqi refugee community in Amman and that, apparently, there were persistent rumours about a partnership between Mr. X and the Applicant.

On 17 November 1992, the UNHCR Representative wrote to the Chief, SWANAME, that, as a result of the administrative investigation, he had asked the Applicant to take immediate leave until a decision could be made on his case by UNHCR Headquarters. On 18 November 1992, the Acting Director, SWANAME, submitted his report to the Director, Division of Human Resources Management (DHRM).

On 26 November 1992, the Director, DHRM, informed the Applicant that the investigation raised "the most serious concerns over your conduct as an international civil servant, as a Senior Protection Officer, as well as Acting Head of the UNHCR Office in Amman". The Director, DHRM, sent the Applicant correspondence relating to the allegations, and requested his comments, pending which the Applicant was put on special leave with full pay. The Applicant submitted his comments to the Director, DHRM, on 4 and 16 December 1992.

On 29 March 1993, the Director, DHRM, recommended to the Director, Personnel Department, that the Applicant's case be submitted to a joint disciplinary committee in accordance with staff rule 110.4(b). Attached to this memorandum were documents concerning a series of events in 1985 and 1986, involving the

Applicant's conduct, unrelated to his work with UNHCR, which had caused embarrassment to the Organization.

On 1 July 1993, the Director, DHRM, informed the Applicant of the decision to refer his case to the Geneva Joint Disciplinary Committee (JDC). The Applicant was charged with two counts of misconduct:

(1) The evaluation by the Applicant of the refugee status of two Iraqi asylum seekers and his personal relationship with Mr. X;

(2) Theft of US$5,000 given to him by the Regional Resettlement Officer for safe-keeping.

On 12 August 1993, the Applicant forwarded his comments to the Secretary of the JDC. On 4 October 1993, the Director, DHRM, submitted to the Secretary of the JDC additional information related to the charges against the Applicant.

On 1 December 1993, the newly appointed Director of DHRM submitted to the Secretary of the JDC additional information concerning the Applicant's evaluations of the two Iraqi asylum seekers. The JDC adopted its report on 12 August 1994. Its findings and recommendations read, in part, as follows:

> "132. ... the Committee held that the staff member had not acted in the manner required by his function and status within the Organization. Indeed, a staff member's private life and relationships should not interfere with [his] professional life to the extent of creating repercussions on his professional environment and casting doubts on the functioning and the integrity of the United Nations. The Committee's concern on this matter was enhanced by the staff member's previous problems in another duty station which should have incited him to be more prudent in his private life so as not to put the Organization in difficult situations. The Committee considered this obligation was especially important in the present case, taking into account the seniority of the staff member and the sensitive field area in which he was operating.
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> 133. In view of these ... findings, the Committee carefully studied all the facts of the case and again had to conclude that there was no factual element or evidence that

there had been an act of misconduct. The staff member had certainly been negligent as to the choice of his acquaintances but there was no proof that [the Applicant] was conscious of acting against the interest of the Organization. The Committee found that the staff member, who was certainly qualified in technical terms for his functions, did not meet other standards of moral and adequate judgment that were required by his functions.

134. In relation to the above finding, the Committee found it necessary to underline that the Organization had a certain part of responsibility as far as the posting of [the Applicant] was concerned. The Committee noted that the Administration had in the past faced certain problems with the staff member and was not entirely satisfied with him. Therefore, the question was raised as to the rationale for renewing the staff member's contract and posting him in a sensitive field with substantial responsibilities. In this respect, the Committee found that if the staff member were to continue working for the United Nations he should be closely supervised.

Theft of US$5,000 in the Branch Office

135. On this matter, the Committee found little to examine. Indeed, the only witness to this incident, Mr. [W], was incapable of corroborating Mr. ..'s contention that he did give money to [the Applicant], therefore there was no way to prove that the alleged incident actually took place.

V. Recommendation

136. There existed strong presumptions that the staff member had not respected the standard of conduct of the Organization; there was however no proof that the staff member had deliberately acted against the interest of the United Nations or committed acts of misconduct, and yet again there was no evidence that he was totally innocent. The Committee reiterates its opinion that the staff member did not meet the required standards of conduct prescribed by the 'Reports on Standards of Conduct in the International Civil Service' in fulfilling his functions and that he acted in an irresponsible and negligent manner. However, the Committee failed to obtain information on the level of importance attached to this type of misconduct in the United Nations Organization as a whole and on the nature of the disciplinary measure normally applied in such cases. The Committee, being concerned that the administration of justice should be coherent throughout the Organization and having the view that

disciplinary measures should be applied independently from the duty station and from the personal judgement of members of the Panel, transmits its report to Headquarters for the determination of the disciplinary measure in accordance with the jurisprudence pertaining to the violation of the 'Report on Standards of Conduct in the International Civil Service' and acts or behaviour that would discredit the United Nations."

On 26 October 1994, the Under-Secretary-General for Administration for Management transmitted to the Applicant a copy of the JDC report and informed him as follows:

"... The Secretary-General has examined your case in the light of the [Joint Disciplinary] Committee's report. The Committee found that you did not meet the moral standards nor exercised adequate judgement required by your functions at UNHCR. Furthermore the Committee has found that you had been negligent and irresponsible in your conduct in that you should have been more prudent in your relationship with Mr. [X] (sic) and in your private life where some of your behaviour became public and cast suspicion on your integrity and on the public image of the Organization.

It is a basic requirement of officers employed at UNHCR, dealing in refugee cases which must subsequently be submitted to Member States, that they command the highest degree of integrity, moral standing and transparency in their public and private conduct.

The Secretary-General has carefully considered the report of the Committee and accepted the conclusion of the Committee that you acted in 'an irresponsible and negligent manner' and that your conduct did not meet the standards required of an international official. He has furthermore concluded that your actions and behaviour constitute misconduct. He has therefore decided that you are to be dismissed from the service of the Organization for misconduct, with 30 days' compensation in lieu of notice in accordance with rule 110.3(vii) of the Staff Rules and Regulations. Your separation shall be effective at the close of business on the day on which you receive this notification.

..."

On 9 August 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JDC made its recommendation based on factual errors and did not observe procedural requirements, thereby denying the Applicant due process.

2. Contrary to the basic principles of law, the burden of proof was shifted to the Applicant.

3. The Applicant was exonerated by senior officials and thus the administrative decision to dismiss him was unjustified.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes misconduct warranting dismissal. The Secretary-General's decision to dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by a mistake of fact, by lack of due process or by prejudice or any other extraneous factors.

2. The Applicant failed to meet the standard of conduct required of international civil servants.

3. The Applicant's due process rights were fully respected.

The Tribunal, having deliberated from 28 October to 25 November 1997, now pronounces the following judgement:

I. The Applicant requests the rescission of a decision by the Secretary-General summarily dismissing him for misconduct. Staff regulation 10.2 reads:

> "The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory. He may summarily dismiss a member of the staff for serious misconduct."

This regulation is further elaborated in Chapter X of the Staff Rules.

II. The provisions referred to above do not allow the Secretary-General unlimited and uninhibited discretion to take disciplinary measures in an arbitrary manner and thus do away with the protection that all staff members desire and deserve. The Tribunal has established its firm and consistent jurisprudence that, in the exercise of his discretion in disciplinary matters, the Secretary-General's action must be free of prejudice, extraneous factors, important procedural irregularities or significant mistakes of fact.

III. The Tribunal notes that, although in the proceedings before the Joint Disciplinary Committee (JDC) no firm conclusion was reached on the two charges specifically brought against the Applicant, the JDC, after a full examination of all the facts that were revealed about the activities, associations, and the attitude of the Applicant, concluded that "the staff member did not meet the required standards of conduct." The Tribunal considers that the JDC examined with thoroughness and in detail all the allegations about or against the Applicant before coming to its conclusions. Further, it properly complied with the procedures for the examination of evidence applicable in administrative matters. In addition, the Tribunal has not found any evidence of the existence of any flaws

that might call into question the proper exercise of discretion by the Respondent.

IV. The Tribunal, after examining the evidence before it, concluded that the Applicant was clearly acting and behaving in a way which was not only against the interests of the United Nations, but was at times against the instructions and wishes of his senior officer (e.g., regarding the Applicant's association with other members of the public).

V. The Tribunal is aware that in many of his activities the Applicant might not have been fully conscious of the harm he was doing to his reputation and the opprobrium he was bringing to the United Nations. However, such lack of awareness cannot exonerate him from the consequences of his actions.

VI. The Applicant has raised the question of due process. The Respondent claims that due process was observed and that the Applicant was given every opportunity to present his point of view. The Tribunal holds that the JDC did not vitiate the principles of due process or fail to justify its main conclusion about the Applicant's unsuitability to continue in the service of the United Nations.

However, the JDC did not make any firm recommendation on the action to be taken against the Applicant. This was due to its desire that the action in this case should be consistent with the action taken in similar cases. It therefore left it to the Respondent to decide what should be done in this case. The Tribunal does not wish to comment on this aspect of the JDC's conclusion. The Tribunal notes that, contrary to the established practice, the JDC did not recommend an appropriate sanction, as it should have done. It left the final decision to the Secretary-General without the benefit of a recommendation. Nevertheless, the

Tribunal is of the view that the Secretary-General exercised his discretion properly, in this case.

Accordingly, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary